1995

David W. Glasscock v. State of Utah, Board of Pardons : Brief of Respondent

Utah Court of Appeals

David W. Glasscock; Petitioner-Appellant.
Brent A. Burnett; Assistant Attorney General; Jan Graham; Utah Attorney General; Attorneys for Respondent-Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

DAVID W. GLASSCOCK,	:	
Petitioner/Appellant,	:	
v.	:	Case No. 950050-CA
STATE OF UTAH, BOARD OF PARDONS,	:	Category No. 3
Respondent/Appellee.	:	

BRIEF OF RESPONDENT-APPELLEE STATE OF UTAH

Appeal from the
Third Judicial District Court, Salt Lake County
Honorable Pat B. Brian, Presiding

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Petitioner-Appellant

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LIST OF ALL PARTIES

To the best of the Respondent-Appellee's knowledge, all interested parties appear in the caption of this Brief.

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STATEMENT OF JURISDICTION

The instant action comes within the original jurisdiction of the Utah Court of Appeals under Utah Code Ann. §78-2a-3(2)(g) (1994).

STATEMENT OF THE ISSUES

1. David W. Glasscock has not marshaled the evidence in support of the trial court's findings of fact and this Court should therefore assume that the record supports such findings and affirm the same.

STANDARD OF REVIEW: This Court should survey the record in the light most favorable to the trial court's findings of fact and only reverse if there is no reasonable basis therein to support the trial court's findings. Northern v. Barnes, 870 P.2d 914, 915 (Utah 1994).

2. Petitioner has raised the question of the constitutionality of Utah's indeterminate sentencing scheme for the first time on appeal. This Court should refuse to consider this claim for the first time on appeal.

STANDARD OF REVIEW: Because this issue was not raised in the lower court, there is no lower court decision to review on this issue.determine whether or not to grant petitioner credit for time served prior to conviction.

3. The Board of Pardon's decisions concerning petitioner were not arbitrary or capricious. The Board was acting in accordance with its authority when it gave the petitioner a rehearing date, and the Board is not bound by the sentencing guidelines.

STANDARD OF REVIEW: This issue presents only a question of law which this Court reviews for correctness giving no deference to the trial court. Lancaster v. Utah Bd. of Pardons, 869 P.2d 945 (Utah 1994).

DETERMINATIVE STATUTES AND RULES

All such materials are to be found in Addendum B.

STATEMENT OF THE CASE

David W. Glasscock, an inmate incarcerated at the Utah State Prison, filed this action for an extraordinary writ alleging that the Board of Pardons had no authority to give him a rehearing date instead of a parole date. R. 7-8. Petitioner also claims that the Board of Pardons, that looks with disfavor upon inmates who continue to deny the criminal wrongdoing according to the petitioner, thereby prevented him from presenting evidence to show Mr. Glasscock's innocence for fear he would be determined to be in denial and given a longer sentence. The respondent, State of Utah, Board of Pardons, filed a Memorandum in Opposition to the Petition for Extraordinary Relief. R. 42-59. The writ was heard on

November 18, 1994 by the trial court. R. 64. Petitioner's Notice of Appeal was filed with the trial court on December 1, 1994. R. 65. Judge Brian's Findings of Fact, Conclusions of Law, and Final Order was entered on December 2, 1994. R. 68-71.

STATEMENT OF RELEVANT FACTS

David Glasscock has not sought to marshal any of the evidence, either that supporting the trial court's findings of fact, or that contrary to the trial court's findings. For this reason, the respondent-appellee submits the following Findings of Fact as entered by the trial court on December 2, 1994 as its statement of relevant facts. A copy of the trial court's Findings, Conclusions and Final Order is attached hereto as Addendum A.

Findings of Fact

1. On or about July 29, 1991, petitioner entered a plea of guilty to the offense of sexual abuse of a child and was sentenced by the Honorable Timothy R. Hanson to serve not less than one year nor more than fifteen years in the Utah State Prison.

2. Petitioner's sentence and conviction have not been reversed or vacated of (sic) appeal.

3. On June 24, 1992, the Board held petitioner's original parole grant hearing at which time the Board set a rehearing date of November, 1994.

4. On June 24, 1992, the Board entered its rationale for its decision which weighed the aggravating circumstances against the mitigating circumstances and determined that an alienist report would be due prior to the rehearing date.

5. On February 14, 1994, the Board responded to inquiries made by petitioner as to the reasons for its decision of June 24, 1992.

6. The Board, in part, justified its decision on the victim's age and the violent nature of the offense, petitioner's relationship to the victim, his denial of the offense, and the lack of sex therapy while at the Utah State Prison. The Board also questioned family support and petitioner's prior arrest conviction and supervision history.

7. A rehearing was held on November 4, 1994 to consider whether petitioner should be granted a parole date. At the conclusion of the hearing, the Board took the matter under advisement.

SUMMARY OF ARGUMENT

David W. Glasscock is serving a one-to-fifteen year sentence. Petitioner presents several vague challenges to the Board of Pardons decisions concerning his eligibility for parole, including some that were not raised in the trial court.

Having failed to marshal the evidence in support of the trial court's findings, Glasscock cannot challenge the same and this Court should assume that the findings are supported by the record.

The Board of Pardon's decisions on how much time the petitioner must serve on his sentence has not been arbitrary or capricious and the petitioner's writ was therefore properly denied.

Glasscock's claim that Utah's indeterminate sentencing

statutes are unconstitutional was not raised in the trial court and should not be heard, for the first time, on appeal.

The Utah Board of Pardons did not abuse its discretion when it gave Mr. Glasscock a rehearing date instead of a parole date at his original parole grant hearing. As long as the decision of the Utah Board of Pardons as to the length of sentence that the petitioner should serve does not exceed the maximum sentence set by law it is presumptively valid and will not be considered arbitrary or capricious absent unusual circumstances, which are not present in the instant action.

ARGUMENT

I. PETITIONER HAS FAILED TO MARSHAL THE EVIDENCE IN SUPPORT OF THE TRIAL COURT'S FINDINGS OF FACT - WHICH SHOULD THEREFORE BE ASSUMED SUPPORTED BY THE RECORD

Glasscock makes no statement of facts in his opening brief. He does not marshal the evidence in support of the trial court's Findings of Facts. Petitioner does not seek to show in any manner that the evidence in the record is insufficient to support the trial court's Findings of Fact. For this reason, this Court should assume that the record supports the findings of the trial court.

> If a challenge is made to the findings, an appellant must marshal all evidence in favor of the facts as found by the trial court and then demonstrate that even viewing the evidence in a light most favorable to the court below, the evidence is insufficient to support the findings of fact. If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court and proceeds to the review of the accuracy of the lower court's conclusions of law and the application of that law in the case.

Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991).

The unchallenged findings of fact show that petitioner is serving a sentence of one-to-fifteen years and that the Board of Pardons has held two hearings concerning the eligibility of the petitioner for release on parole. R. 69-70. At the initial hearing, the Board identified the aggravating and mitigating factors that it considered, and determined not to set a parole date for Mr. Glasscock at that time, but rather to rehear the matter some two years later, and that an alienist report be prepared for the Board before that time. R. 54-56, 69-70.

Because petitioner has not marshaled the evidence in support of the trial court's findings of fact, and has not shown how the evidence of record is insufficient to support the trial court's factual findings, this Court should assume "that the record supports the findings of the trial court" and proceed "to the review of the accuracy of the lower court's conclusions of law and the application of that law in the case." Saunders, 806 P.2d at 199.

II. THIS COURT SHOULD REFUSE TO CONSIDER THOSE ISSUES THAT THE PETITIONER RAISES FOR THE FIRST TIME ON APPEAL

Mr. Glasscock claims, for the first time on appeal, that Utah's indeterminate sentencing scheme is unconstitutional as applied to him. In the trial court, Glasscock did not present this argument in any manner.

In the trial court, Glasscock claimed that the Board of Pardons had no authority to give him a rehearing date, as opposed

to a parole date. R. 9.

Glasscock also claimed that he "could not present evidence in his behalf or statements in mitigation because the Board would have held him in denial and if Board records were subpoenaed it would prove those who attempt to present statements in mitigation get held in denial." R. 5. In essence, this argument is that the Board of Pardons, because it looks with disfavor upon inmates who continue to deny responsibility for the actions that led to their incarceration, intimidated petitioner from making his own claims to the Board that he was innocent and that he, Glasscock, did not commit the sexual abuse of a child to which he actually pled guilty and for which he is currently incarcerated. R. 5-8.

Petitioner claimed that he should have been afforded counsel at the original parole hearing.[1] R. 7.

Mr. Glasscock also claimed that the Utah Board of Pardons erred in not following the guidelines in his case. R. 9.

Finally, Mr. Glasscock claimed that the class of sex offenders was a "suspect classification" and that he had been treated unfairly because of his status as a sex offender.[2] R. 10. At no

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[1] This issue has not been raised on appeal. Even if it were raised, the Utah Supreme Court has clearly rejected the claim that an inmate is entitled to the assistance of counsel in an initial parole grant hearing in Neel v. Holden, 886 P.2d 1097, 1103-4 (Utah 1994).

[2] But petitioner failed to make any showing in the trial court in support of his claim that sex offenders were receiving longer periods of incarceration than other offenders. Given petitioner's failure to support this claim in any manner, this court should refuse to consider this matter further. This claim was not pursued before the trial court.

time did petitioner raise the claim that Utah's indeterminate sentencing scheme was unconstitutional before the trial court.

In Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412 (Utah 1990), the plaintiffs raised a constitutional claim for the first time on appeal. In refusing to consider that claim, the Utah Supreme Court explained:

> Appellants' first claim is that the realignment violated article I, section 7 of the Utah Constitution by denying them the liberty to control their children's education. This claim was raised for the first time on appeal. With limited exceptions, the practice of this Court has been to decline consideration of issues raised for the first time on appeal. We therefore do not address this claim.

Id. at 413 (citations omitted). The limited exceptions to this general rule referred to in Espinal deal with cases in which the appellate court is persuaded that "the trial court committed plain error or exceptional circumstances exist in this case." State v. Sepulveda, 842 P.2d 913, 917-18 (Utah App. 1992) (footnote omitted). See also State v. Brown, 853 P.2d 851, 853 (Utah 1992); State v. Emmett, 839 P.2d 781 (Utah 1992).

It was the duty of the petitioner to raise any and all claims against the respondent Board of Pardons in the trial court. Glasscock's claim that the indeterminate sentencing scheme is unconstitutional was not raised in the trial court. Further, Glasscock has not briefed the question of whether plain error or other exceptional circumstances might exist that could lead this Court to consider this issue for the first time on appeal. Where the petitioner has not analyzed an issue in his opening brief, this

Court will not review that issue. Brown, 853 P.2d at 854 n.1.

III. THE DECISION OF THE UTAH STATE BOARD OF PARDONS AND PAROLE CONCERNING DAVID W. GLASSCOCK HAS NOT VIOLATED ANY CONSTITUTIONAL RIGHT OF THE PETITIONER

In Malek v. Sawaya, 730 P.2d 629, 630 (Utah 1986), the Utah Supreme Court made it clear that an extraordinary writ is "not an available remedy in the absence of a claim of fundamental unfairness at trial or a substantial and prejudicial denial of constitutional rights." The trial court correctly determined that petitioner had failed to present such a claim.

A. The Board's decisions concerning Glasscock's parole status were neither arbitrary nor capricious. The Board is not bound by the sentencing guidelines and is free to set petitioner's period of incarceration as it sees fit so long as the time served falls within the applicable indeterminate range.

Glasscock's claims concerning the Board of Pardons' decision to give petitioner a rehearing date instead of a parole date demonstrate a misunderstanding of Utah law. Petitioner does not seem to understand that he is still serving a one-to-fifteen year sentence and that the Utah Board of Pardons has discretion to require him to serve any or all of that sentence. Preece v. House, 886 P.2d 508, 511-12 (Utah 1994). The Board is not required to conform to the sentencing guidelines. Id. Utah's sentencing guidelines "used by the board of pardons do not have the force and effect of law." Id; see also, Hall v. Utah Bd. of Pardons, 806 P.2d 217, 218 (Utah App. 1991). Absent some other constitutional infirmity, the courts do not sit as a panel of review on the Board's function. Lancaster v. Utah Bd. of Pardons, 869 P.2d 945, 947 (Utah 1994). "So long as the period of incarceration decided

upon by the board of pardons falls within an inmate's applicable indeterminate range . . . then that decision, absent unusual circumstances, cannot be arbitrary and capricious." Preece, 886 P.2d at 512.

The very claim made by Mr. Glasscock was rejected by the Utah Supreme Court in Lancaster. As in the instant action, Lancaster involved an inmate's challenge to a rehearing date that he had been given in lieu of a parole date.

> He also challenges the Board's failure to fix the exact number of years he would serve on his indeterminate sentence, . . . None of these claims describe a due process violation reviewable under Foote or Labrum.

869 P.2d at 947. There is nothing improper or unlawful about the Board of Pardons practice of refusing to set parole dates for those inmates that the Board, in its judgment, feels should not be released on parole. Indeed the statute governing initial parole grant hearings expressly authorizes the Board to give a rehearing date instead of a parole date. Utah Code § 77-27-7 (1994).

The trial court correctly dismissed petitioner's challenge to the Board of Pardon's decision concerning the length of time that petitioner must serve before he will be placed on parole. There is nothing arbitrary and capricious about the board's decision to not permit the petitioner parole. The Board of Pardons power to set a parole date includes the authority to deny a parole date. The Board has the power to determine that an inmate should serve his maximum sentence.

At best, the petitioner can only claim that this is what a

rehearing date is. The only argument petitioner could make is that the rehearing date simply indicates that the Board is not inclined to believe that the prisoner should receive a parole date at that time, but that the decision will be reconsidered on a date certain. This is well within the authority of the Board to do. Petitioner has no right to parole. Glasscock has no right to a particular parole date. The Board of Pardons decision not to set a parole date for Mr. Glasscock did not violate any right of the petitioner.

The Board of Pardons informed petitioner of the aggravating and mitigating circumstances that had been considered in reaching its decision. R. 55. Petitioner has never claimed that he was not given access to the materials considered by the Board in reaching their decision. Given these circumstances, the trial court correctly dismissed this petition and that decision should be affirmed on appeal.

B. The fact that the Board of Pardons might not believe the petitioner's claims of innocence did not work a substantial and prejudicial denial of the constitutional rights of Mr. Glasscock.

Mr. Glasscock claims that he was, by his own fears and not the actions of the Board of Pardons, precluded from presenting mitigating evidence before the Board of Pardons which would have shown that Mr. Glasscock was not guilty of the crime he pled guilty too and that the guilty plea was invalid. Petitioner does not claim that the Board would not permit him to present this evidence, but rather that he feared that the Board would not believe his claim that he was innocent of the crime to which he had pleaded guilty. Petitioner feared that, if the Board did not believe his

protestations of innocence, the Board would consider the petitioner to be denying his responsibility for his criminal wrongdoing and therefore be a poor risk for parole.

Mr. Glasscock's claim was properly rejected by the trial court. Petitioner did not raise this issue before the Board of Pardons and could not raise it, or litigate it, for the first time in the subsequent extraordinary writ proceeding. Brinkerhoff v. Schwendiman, 790 P.2d 587, 589 (Utah App. 1990).

The fact that the Board of Pardons may not believe an inmate's protestations of innocence (especially where the inmate has pled guilty to the charge and has not sought to have that guilty plea set aside) does not create a substantial and prejudicial denial of the inmate's constitutional rights. This is especially so when, as here, the inmate did not actually present his evidence to the Board but asks this Court to presume what the Board's reaction to that evidence would have been. This Court should not make such a presumption that the Board, in a hypothetical situation that has not occurred, would violate the constitutional rights of petitioner.

Indeed, the claims made by the petitioner are not actually mitigating circumstances that would influence the Board's decision concerning a parole date for Mr. Glasscock. Rather than factors that would influence the Board to believe that petitioner has served sufficiently his sentence and is now ready to be placed on parole, the petitioner's allegations instead address the issue of whether or not petitioner is lawfully incarcerated in the first

place. The claims of improprieties in the taking of his plea of guilty would be more appropriately raised by the petitioner in a motion to withdraw his guilty plea, and an extraordinary writ proceeding pursuant to Rule 65B(b) of the Utah Rules of Civil Procedure.

The only involvement of the Board of Pardons and Parole in such claims would be in considering an application for a pardon, not as mitigating factors in a parole hearing.

The trial court correctly held that a parole grant hearing is not the proper forum for the petitioner to challenge his underlying conviction. The trial court correctly dismissed the instant petition and that decision should be affirmed on appeal.

CONCLUSION

The trial court correctly dismissed Mr. Glasscock's petition for an extraordinary writ and its decision should therefore be affirmed.

ORAL ARGUMENT AND A PUBLISHED OPINION NOT REQUESTED BY THE RESPONDENT-APPELLEE

The State of Utah's Board of Pardons does not request oral argument and a published opinion in this matter. Petitioner's claims are contrary to clearly established law and the issues presented have been previously resolved by the Courts of Utah.

Respectfully submitted this 26th day of May, 1995.

BRENT A. BURNETT
Assistant Attorney General
Attorneys for Respondent-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondent-Appellee State of Utah, postage prepaid, to the following on this the 26th day of May, 1995:

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P. O. Box 250
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ADDENDUM "A"

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IN THE THIRD JUDICIAL DISTRICT COURT

FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

David Wayne Glasscock, Plaintiff, v. Board of Pardons, Respondents.	**Findings of Fact, Conclusions of Law, and Final Order** **Case No. 940902334 HC** **Judge Pat B. Brian**

The hearing on the Petition for Extraordinary Relief filed by David Wayne Glasscock came before this Court and was heard on November 18, 1994 at 10:30 a.m.. Petitioner appeared pro se. Martha S. Stonebrook, Assistant Attorney General, appeared on behalf of the Utah State Board of Pardons (hereinafter "the Board"). Based upon the pleadings filed in this matter, the arguments of the parties, and for good cause shown thereon, this Court issues the following Findings of Fact, Conclusions of Law, and Final Order:

FINDINGS OF FACT

1. On or about July 29, 1991, petitioner entered a plea of guilty to the offense of sexual abuse of a child and was sentenced by the Honorable Timothy R. Hanson to serve not less than one year nor more than fifteen years in the Utah State Prison.

2. Petitioner's sentence and conviction have not been reversed or vacated of appeal.

3. On June 24, 1992, the Board held petitioner's original parole grant hearing at which time the Board set a rehearing date of November, 1994.

4. On June 24, 1992, the Board entered its rationale for its decision which weighed the aggravating circumstances against the mitigating circumstances and determined that an alienist report would be due prior to the rehearing date.

5. On February 14, 1994, the Board responded to inquiries made by petitioner as to the reasons for its decision of June 24, 1992.

6. The Board, in part, justified its decision on the victim's age and the violent nature of the offense, petitioner's relationship to the victim, his denial of the offense, and the lack of sex therapy while at the Utah State Prison. The Board also questioned family support and petitioner's prior arrest conviction and supervision history.

7. A rehearing was held on November 4, 1994 to consider whether petitioner should be granted a parole date. At the conclusion of the hearing, the Board took the matter under advisement.

CONCLUSIONS OF LAW

1. This court does not have jurisdiction over nor does it have the power to control the Board.

2. The Board has complete discretion in determining when a prisoner will be released.

3. Petitioner does not have a protected interest in nor an expectation of parole.

4. The Utah sentencing guidelines and matrix are not mandatory and are not binding on the Board.

5. The parole hearing is not the proper forum in which to reargue petitioner's case.

6. In this matter, all elements of due process have been met.

ORDER

Now, wherefore, it is hereby ordered that the relief requested in respondent's Memorandum in Opposition is granted and petitioner's Petition for Extraordinary Relief is denied and dismissed with prejudice.

BY THE COURT:

Honorable Pat B. Brian
District Court Judge

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of November, 1994, a true and correct copy of the foregoing unsigned FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER was mailed, first-class postage to:

David Wayne Glasscock #18886
Utah State Prison
P.O. Box 250
Draper, Utah 84020

ADDENDUM "B"

DETERMINATIVE STATUTES AND RULES

Utah Code § 77-27-7 **Parole or hearing dates - Interview - Hearings - Report of alienists - Mental competency.**

(1) The Board of Pardons and Parole shall determine within six months after the date of an offender's commitment to the custody of the Department of Corrections, for serving a sentence upon conviction of a felony or class A misdemeanor offense, a date upon which the offender shall be afforded a hearing to establish a date of release or a date for a rehearing, and shall promptly notify the offender of the date.

R671-201-1. Schedule and Notice.

Within six months of an offender's commitment to prison the Board will give notice of the month and year in which the inmate's original hearing will be conducted. A minimum of one week (7 calendar days) prior notice should be given regarding the specific day and approximate time of such hearing.

An inmate who is serving up to a life sentence will be eligible for a hearing after the service of three years.

An inmate who is serving a sentence of up to fifteen years will be eligible for a hearing after the service of nine months.

An inmate who is serving a sentence of up to five years including Class A Misdemeanor commitments will be eligible for a hearing after the service of ninety days.

Excluded from the above provisions are inmates who are sentenced to death.

An inmate may petition the Board to calendar him/her at a time other than the usual times designated above or the Board may do so on its own motion. A petition by the inmate shall set out the exigencies which give rise to the request. The Board shall notify the petitioner of its decision in writing as soon as possible.